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No. 04-1115

In the Supreme Court of the United States

SEATTLE HOUSING AND RESOURCE EFFORT,
PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Postal Service's restrictions on the availability of general delivery service and no-fee boxes violate the First Amendment rights of homeless individuals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 379 F.3d 716. The opinion of the district court (Pet. App. 36-54) is reported at 190 F. Supp. 2d 1221.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2004. A petition for rehearing was denied on November 17, 2004 (Pet. App. 57-58). The petition for a writ of certiorari was filed on February 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Carl Currier, David Bar, and Willard Johnson are three homeless men who live in Seattle, Washington. Pet.

App. 2-3. In May and June of 2000, they sought from the United States Postal Service either no-fee boxes or general delivery at local postal facilities. *Id.* at 3. Under then-existing postal regulations, persons ineligible for carrier delivery service could obtain no-fee postal boxes. See Domestic Mail Manual (DMM) D910.5.1(a) (Issue 55, Jan. 10, 2000). Because of increased security concerns, those regulations were subsequently revised to require persons seeking a no-fee box to have a physical address. Pet. App. 20; see DMM D910.5.2 (Issue 57, June 30, 2002). General delivery allows a person to receive mail addressed to his or her name, with the designation "General Delivery, [City Name]." Pet. App. 3. Mail is held for 30 days for pick-up by the addressee. DMM D930.1.4. In a city with multiple postal facilities, general delivery is provided only at a single location. DMM D930.1.2.

The Postal service informed Currier, Bar, and Johnson that they were ineligible for no-fee postal boxes and that they could receive general delivery only at the Main Post Office in downtown Seattle. Pet. App. 4. With the assistance of Seattle Housing and Resource Effort (petitioner), a homeless-advocacy group, Currier, Bar, and a third homeless person, James Kerns, filed an administrative challenge to the denial of those services. *Ibid.* An Administrative Law Judge held that the services were properly denied. *Id.* at 59-74. In the absence of any administrative appeal, that decision became the final decision of the Postal Service. *Id.* at 75.

Petitioner and the three individual homeless persons then filed suit against the Postal Service in the United States District Court for the Western District of Washington, alleging *inter alia*, that the denial of no-fee boxes and general delivery at locations other than the Main Post Office violated the First Amendment rights of homeless per-

sons. The district court rejected that First Amendment claim. The court reasoned that the Postal Service's policies concerning no-fee boxes and general delivery are content-neutral and reasonably advance the statutory goals of efficient and economical mail delivery. Pet. App. 49-51.

3. The court of appeals affirmed. Pet. App. 1-35. The court applied forum analysis to resolve petitioner's First Amendment claim. As the court explained, under forum analysis, a court first identifies the relevant forum; it then decides whether the forum is public or nonpublic; and it then applies the level scrutiny that is dictated by the nature of the forum. *Id.* at 13.

Applying that analysis, the court first held that the relevant forum for petitioner's challenge to the Postal Service's restriction on general delivery is the general delivery mail service, rather than the mail system as a whole. Pet. App. 14. The court reasoned that the relevant forum is the one to which a speaker seeks access, and the homeless persons here seek access to the general delivery mail system, rather than to the mail system as a whole. *Ibid.*

The court next held that the general delivery mail service is a nonpublic forum. The court concluded that the general delivery mail service "lacks the hallowed history as a crucible of unfettered public debate necessary to establish traditional public forum status." Pet. App. 17. The court also concluded that the general delivery mail service is not a limited public forum, because the Postal Service intends for that service to facilitate temporary mail delivery to a limited class of postal customers, not to serve as a public forum for the exchange of a wide range of views. *Id.* at 17-18.

Applying the "reasonableness standard" applicable to restrictions on access to a nonpublic forum, the court of appeals held that the Postal Service policy of limiting gen-

eral delivery to a single location is consistent with the First Amendment because it is content-neutral and is reasonable in light of the Postal Service's resource and efficiency concerns. Pet. App. 19. Noting that it was presented only with a facial challenge, the court expressed "no opinion regarding whether relief might be appropriate upon an individual plaintiff's affirmative demonstration that the regulation as applied to his individual circumstances effectively bars him from receiving mail at the sole general delivery location." *Id.* at 19-20 n.9.

The court of appeals also rejected the First Amendment challenge to the Postal Service's no-fee box policy. Pet. App. 20-21. Viewing such boxes as nonpublic fora, the court concluded that the restrictions on their availability are both content-neutral and reasonable in light of the Postal Service's statutory mandate to provide efficient and economical service. *Ibid.*

Judge Gould concurred in the judgment, but dissented from some of the court's reasoning. Pet. App. 24-35. Viewing the relevant forum as the entire mail system, and viewing that forum as a public forum, Judge Gould nonetheless concluded that the policies at issue are facially constitutional. *Id.* at 35. While Judge Gould agreed that this case involved only a facial challenge, he concluded that the policies would be unconstitutional as applied to homeless persons who "lack an adequate alternative channel of communication if they practically cannot receive general delivery mail at the main post office." *Id.* at 34-35.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly rejected petitioner's challenge to the Postal Service policies at issue in this case. Applying settled principles, the court of appeals correctly held that the general delivery system and no-fee boxes are nonpublic fora and that the Postal Service policies at issue impose reasonable limitations on access to those fora.

a. Petitioner contends (Pet. 17) that the court erred by identifying the relevant fora as the general delivery system and the no-fee boxes, rather than the mail system as a whole. In defining the relevant forum, however, the Court has focused on "the access sought by the speaker." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800-801 (1985). Here, petitioner sought access to the general mail delivery system and no-fee boxes. Accordingly, the court correctly identified the general mail delivery system and no-fee boxes, rather than the mail delivery system as a whole, as the relevant fora.

The Court's decision in *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981), reinforces that conclusion. In that case, the plaintiffs claimed a First Amendment right to deposit unstamped letters in home mail boxes. In rejecting that claim, the Court focused on the letterboxes as the relevant forum, not the mail system as a whole.

Petitioner contends (Pet. 17 & n.17) that *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983), and *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), support its view that the mail system as a whole is the relevant forum. Petitioner's reliance on those cases is misplaced. In *Perry*, the Court held that the relevant forum was an internal school mail system, not an individual teacher's mail box, and in *Lehman*, the Court held that the forum was a city's transit advertising program, rather than individual city buses. According to petitioner,

those cases demonstrate that "[w]hen components of a forum are substantially similar and serve the same communicative purpose, * * * the forum [is defined] as the aggregate of the components." Pet. 17. Even if that abstract principle could be derived from those cases, however, it would not assist petitioner. Unlike the teacher mailboxes in *Perry* and the buses in *Lehman*, the various services provided by the Postal Service are not "substantially similar." The Postal Service offers four "modes of delivery"—general delivery, caller service, carrier delivery, and post office box service. 39 C.F.R. Pt. 3001, Subpt. C, App. A § 2010. Each one has different costs and operational demands for the Postal Service. See, *e.g.*, Pet. App. 3-4, 19, 21 (describing general delivery and no-fee postal box service). The aggregation principle that petitioner would derive from *Perry* and *Lehman* is therefore inapposite here.

Petitioner's reliance (Pet. 18) on *Texas* v. *Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995), is also misplaced. In that case, the court held that denying the Ku Klux Klan the opportunity to participate in the State's adopt-a-highway program did not violate the Klan's First Amendment rights. Because the Klan sought access to the adopt-the-highway program, the court held that the relevant forum was that program and not the public highways as a whole. *Id.* at 1078. There is no inconsistency between that decision and the decision in this case. To the contrary, in both cases the courts identified the relevant forum based on the access sought by the plaintiff.

b. Petitioner contends (Pet. 21) that even if the mail system as a whole is not the relevant forum, general delivery and no-fee boxes are public fora. As the court of appeals explained (Pet. App. 17), however, general delivery lacks the history as a forum of unfettered public debate, and the Postal Service has not affirmatively opened it up as

a general forum for public debate. Instead, the Postal Service uses general delivery service "merely to facilitate temporary mail delivery to a limited class of users." *Id.* at 18. Similarly, no-fee boxes are not traditional public fora, and the Postal Service has not opened them up as fora for general public debate. The court of appeals therefore correctly concluded that general delivery and no-fee boxes are nonpublic fora.

Petitioner argues (Pet. 21) that general delivery and no-fee boxes are public fora because they serve a communicative function. Under this Court's cases, however, "the mere fact that an instrumentality is used for the communication of ideas does not make it a public forum." *Cornelius*, 460 U.S. at 49 n.9; see *Greenburgh*, 453 U.S. at 130 n.6. Just as the letterboxes at issue in *Greenburgh* constituted nonpublic fora even though they were used for communicative purposes, the general delivery service and no-fee boxes are also nonpublic fora.

c. The Postal Service's polices easily satisfy the "reasonableness" standard applicable to nonpublic fora. See *Perry*, 460 U.S. at 46. Confining general delivery service to a single location in areas where a post office operates through multiple branches serves the statutory objective of efficient and economical mail delivery. See 39 U.S.C. 403(a) (duty of Postal Service to "provide adequate and efficient postal services at fair and reasonable rates and fees"). Expanding general delivery to all branch post offices in an attempt to allow homeless customers to pick up items addressed to them at the nearest location would impose significant practical difficulties. Many senders of general delivery mail address items with a station or branch name but an incorrect ZIP Code. If general delivery were expanded to all branch offices, the Postal Service would have no way

to determine the intended location for such items. Suppl. Excerpts of Record (SER) 2-3.

Decentralizing general delivery service would also impose additional burdens and costs. Mail items addressed to an individual at "General Delivery" usually cannot be sorted by automated equipment because most of the items lack ZIP Codes. Excerpts of Record (ER) 158-159; SER 29. That service also requires a counter transaction for each delivery. ER 158-159. Centralizing general delivery at a single location in a city also permits economies of scale. If such mail went to all branch post offices, it would overburden those already operating at capacity, especially if the incremental workload did not justify hiring an additional worker. SER 24.

The Seattle Main Post Office receives approximately 500 to 600 first class letters, 250 to 300 larger envelopes and magazines, and 25 parcels per week addressed to individuals at "General Delivery." SER 29. For two or three days at the beginning of each month, the letter volume doubles (as a result of government benefit checks). *Ibid.* Approximately 80 to 100 persons per day call for general delivery mail at that facility. *Ibid.* The tasks of sorting that incoming mail, serving those customers, and returning unclaimed items require a full-time clerk. *Ibid.* Dispersing those tasks to all 32 geographically separate stations that are part of the Seattle Post Office would require significant additional resources (SER 22), and the costs would be much magnified if such expanded service were to be made available in cities nationwide.

Petitioner contends (Pet. 24-25) that the government may not legitimately take into account such burdens and costs. In support of that contention, petitioner relies on three Ninth Circuit decisions that invalidated restrictions on prisoners' ability to receive bulk mail. Those cases, how-

ever, did not reject administrative burdens and budgetary impacts as legitimate considerations. In two of the cases, the court struck down the limitations at issue as arbitrary because the record did not establish any basis for distinguishing the prohibited categories of mail from permitted categories. *Prison Legal News* v. *Lehman*, 397 F.3d 692, 700 (9th Cir. 2005); *Morrison* v. *Hall*, 261 F.3d 896, 903-904 (9th Cir. 2001). In the third case, the court held that the record failed to show that the restriction relieved any significant burden on staff resources. *Prison Legal News* v. *Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001). Here, the record contains substantial evidence supporting the Postal Service's conclusion that expanding general delivery would impose significant burdens and costs. The decisions relied on by petitioner are therefore inapposite here.

For similar reasons, the Postal Service's policies concerning no-fee boxes satisfy the reasonableness standard. The costs of providing no-fee boxes to all homeless persons would be substantial, Pet. App. 21, and the Court has squarely rejected the notion "that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 546 (1993) (internal quotation marks and citation omitted).

2. Review is also unwarranted in this case because petitioner's contention that the Postal Service's policies violate the rights of all homeless persons as a class could not succeed even if the relevant forum were the mail system as a whole and the mail system were viewed as a public forum. In that event, the Postal Service's policies would have to satisfy the standards for time, place, and manner restrictions. They would have to (1) be "justified without reference to the content of the regulated speech," (2) be "narrowly tailored to serve a significant governmental interest,"

and (3) "leave open ample alternative channels for communication of the information." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The Postal Service polices satisfy that standard as applied to homeless persons as a class. As Judge Gould explained in his concurring and dissenting opinion, the Postal Service policies are content neutral, they significantly further the legitimate interest in keeping costs down, and there has been no showing that all homeless persons as a class lack adequate means for receiving their mail. Pet. App. 31-35.

3. Review is also unwarranted in this case because of the limited nature of the court of appeals' decision. The court in this case addressed only petitioner's contention that the Postal Service's general delivery and no-fee box policies violate the First Amendment rights of all homeless persons as a class, without regard to whether such persons have adequate means of receiving mail. The court expressed "no opinion regarding whether relief might be appropriate upon an individual plaintiff's affirmative demonstration that the regulation as applied to his individual circumstances effectively bars him from receiving mail at the sole general delivery location." Pet. App. 19-20 n.9. Because the court correctly resolved the broad-based attack launched by the individual plaintiffs and petitioner, and left open as-applied challenges by persons who could make a showing that the Postal Service's policies preclude them from receiving their mail, review by this Court is clearly not warranted.

4. Finally, the individual homeless persons who originally brought this action are no longer parties to the case. The sole petitioner is a homeless advocacy group. There is a substantial question whether that organization has stand-

ing to maintain this action. For that reason as well, review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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